IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1352 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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KALUBHAI ISABHAI JUNEJA(DAFER) - Appellant(s)
Versus
THE STATE OF GUJARAT - Opponent(s)

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Appearance :
MR HEMANG R RAWAL for Appellant(s) : 1,
MR.BHATE, ADDL. PUBLIC PROSECUTOR for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 16/10/2007

ORAL JUDGMENT

Present appeal is preferred by the appellant under the provisions of Section 374 (2) of the Code of Criminal Procedure Code, challenging the legality and validity of the judgment and order of conviction

and sentence passed by the learned Additional Sessions Judge, Gondal, in Sessions Case No.35 of 2004 on 12th January, 2005. The appellant-accused has been charged and tried for the offence punishable under Section 394, 397 and 212 of the Indian Penal Code wherein at the end of trial the learned Judge was pleased to convict the appellant for the offence punishable under Sections 394 and 397 of the Indian Penal Code and sentenced them as under:

i) For the offence punishable under Section 394 of the Indian Penal Code the appellant-accused is ordered to undergo simple imprisonment for five years and to pay a fine of Rs.2,000/-, in default to undergo four months simple imprisonment.

ii) For the offence punishable under Section 397 of the Indian Penal Code the appellant-accused is ordered to undergo simple imprisonment for seven years to and to pay a fine of Rs.3,000/- in default to undergo six months simple imprisonment.

1.1 The aforesaid sentences are ordered to run concurrently. However, the learned Jude has been pleased to acquit the appellant-accused for the offence punishable under Section 212 of the Indian Penal Code.

2. Mr.Hemang R. Raval, learned Advocate for the appellant has taken this Court through the various grounds of challenge as mentioned in paragraph 4 of the memo of appeal. It is submitted that the accused ought to have been acquitted from the charges levelled against him or at least he was entitled to benefit of doubt in the background of crucial fact that similarly situated three accused persons were acquitted at the conclusion of trial and the present accused person even as per say of prosecution is one of the co-accused. There is no material difference in the nature of evidence led by prosecution against the present appellant, vis-a-vis the evidence led against the three acquitted accused persons, who had been tried as accused of Sessions Case No.154 of 1995. The difference in the evidence of present case

is insignificant in nature and it was not safe for the trial Court to place reliance on the evidence of the complainant who claims to have identified the appellant-accused alongwith other three acquitted accused persons. There are number of infirmities in evidence led by prosecution. No muddamal has been recovered at the instance of accused nor from the custody of the accused. The test identification parade was arranged after nine years of the incident. Ultimately, the evidence collected in the form of test identification parade, as per settled legal position is not a substantive piece of evidence and when complainant claims that he is able to identify the accused even after nine years in open Court, this aspect ought not to have been given any weightage than required especially when he was not believed on the very crucial aspect qua the rest of the accused persons who have been acquitted by the trial Court in Sessions Case No.154 of 1995.

3. When this matter was listed for final hearing, certain deliberations were made but at the outset the Court found that the papers of Sessions

Case No.154 of 1995 were not before this Court so in the interest of justice the Court found that the judgment of acquitted accused persons recorded by the learned trial Judge of the same crime should be looked into otherwise it is likely to cause serious prejudice either to prosecution or to the present appellant-accused and therefore the Registry on the strength of the order passed by this Court has called for the papers of Sessions Case No.154 of 1995 and those records and proceedings are made available to the Court for perusal. This Court is not supposed to consider any part of evidence or evidence tendered in the Sessions Case No.154 of 1995 which was earlier tried. It would be nothing but an extraneous consideration. However, the learned Advocate appearing for the appellant has very well relied upon the finding recorded by the learned trial Judge in respect of three accused persons who have been acquitted and their acquittal appears to have become final. Because, according to Mr.Raval and Mr.Bhate, ld. A.P.P., as per available information no acquittal appeal has been preferred by the State against those acquitted accused persons of Sessions Case No.154 of

1995. So, without entering into merits of other pieces of evidence, according to Mr.Raval the present appeal requires to be allowed and appellant may be acquitted by observing that it would not be safe for this Court to accept the say of complainant as gospel truth that he was able to identify the accused during the test identification parade even after lapse of about nine years and he has identified that person and his evidence of identifying the accused in the open Court should be treated as a very weak piece of evidence because the name of the accused was very well reflected in the charge framed of Sessions Case No.154 of 1995.

4. So far as the conduct of the accused is concerned, he was remained as absconding accused for about nine years and same is an incriminating circumstance against him. However, it is submitted that such circumstance alone is not sufficient to link the accused with the crime. There may be number of other reasons under which the accused may have remained away from his native place. It is very likely that Police may not care to arrest the

accused, because accused has attended number of family functions during the period of nine years. All these possibilities and probabilities has not been considered by the learned trial Judge and therefore only on the strength of the evidence of the complainant identifying the accused as person culprit convicted and sentenced him.

5. According to Mr.Bhate, learned A.P.P. the learned trial Judge has rightly recorded the conviction. In earlier case being Sessions Case No.154 of 1995, there was no test identification parade and the evidence which was available to the trial Court for perusal was of identification of the accused persons in the Court room only. So in absence of test identification parade, the learned trial Court in that Sessions Case has held that the identification of the accused in the Court room for the first time by the complainant so far as those acquitted accused persons are concerned, is a weak piece of evidence and it would not be safe to rely on such evidence especially when the incident undisputedly had occurred in the night hours and the

accused persons were not even known to the complainant or witnesses examined. Under such fear the complainant would have limited period of time to look at the faces of the accused but it depends on the memory of an individual and when the complainant has identified the accused during test identification parade and thereafter again in the open Court while giving evidence, there was no reason for the trial Court to discard the evidence of the complainant. The recovery of muddamal after nine years form the accused or at his instance, is not possible. The muddamal was recovered after the arrest of other accused who was tried. It is also submitted that because of the offence committed at night hours, the evidence of complainant should not be viewed with doubt as to the identity of the accused. It is also submitted that in such a serious case, the learned trial Court ought to have imposed rigorous imprisonment instead of simple imprisonment. He has submitted that looking to the facts and circumstances of the case, the order of conviction and sentence requires to be upheld.

6. On careful reading of the evidence of the complainant (Exh.29), Panchnama of test identification parade (Exh.27) and the finding recorded by the learned trial Judge while acquitting the accused persons at the conclusion of the trial of Sessions Case No.154 of 1995, the Court has found enough force in the submission of Mr.Raval, learned Advocate appearing for the appellant. It is rightly argued that evidence collected by way of test identification parade is not a substantive piece of evidence and the identification in the Court only constitutes substantive evidence. Earlier, this very complainant has not been believed so far as acquitted accused persons are concerned keeping this very aspect in mind by the learned trial Judge and therefore this witness was not believed and the accused persons were acquitted.

7. It would be necessary to give a look on the basic facts placed by prosecution. It is alleged that complainant-Harsukhbhai Dharamsinhbhai, resident of town Dhoraji, Dist: Rajkot and his brother Ratilal having their agricultural field at the outskirts of

village Supedi. It is alleged that Ratilal was proceeded towards village Supedi, as he was to pay remuneration towards the labour work to the persons employed by them and when he was on his way to village Supedi, he was intercepted and beaten up by unknown persons and as a result of which Ratilal sustained injuries in the nature of grievous hurt. The complainant came to know about this fact and he rushed to the Dhoraji Government Hospital and after gathering information from his brother-Ratilal, he lodged the complaint on 16th June, 1995 at about 10:00 p.m. According to prosecution, this Ratilal was proceeded on his motorcycle bearing Registration No.GJ-2C-2575 at about 9:00 p.m. One Kantilal Ghelabhai, neighbour of the complainant informed the complainant that his elder brother – Ratilal was looted near Raidhara bridge on the highway by four unknown accused persons and motorcycle was taken away after inflicting injuries to Ratilal. After completion of the investigation, the Police was able to recover the muddamal motorcycle. Ratilal has been examined as prosecution witness and he is the person who has been believed by the learned trial Judge who

has identified the present appellant as one of the accused persons. The original accused No.1 of Sessions Case No.154 of 1995 was prosecuted under the charge that he was the person responsible for giving shelter to the accused persons who were involved in the offence.

8. As such there is no dispute as to the nature of injuries that were found on the body of the person injured, i.e. Prosecution Witness No.11-Ratilal or the fact that he was looted. It was not a matter of dispute that motorcycle was taken by the assailant. The crucial question paused before the Court by Mr.Raval is that there was no cogent evidence before the learned trial Judge to link the accused with the crime except bare word of Prosecution Witness No.11-Ratilal who has been examined at Exh.29. He has stated in his evidence that when he was proceeded towards Village Supedi, two persons were standing on the highway with motorbike and had requested this witness to give some petrol claiming that there is no petrol in their motorcycle. The allegation is that demand of petrol was only a pretext and thereby

intercepted this witness-Ratilal and upon his denial, Ratilal was caught hold off, dragged, beaten up and looted. It is claimed by this witness that in the headlight of the motorcycle, he was able to identify all the four accused persons. It is not the say of prosecution that for a particular reason or on account of a visible identification mark on the present appellant, Ratilal was able to identify him. When version of Prosecution Witness No.11-Ratilal identifying other three accused persons who was caught in couple of days from the date of incident, was not found reliable then his claim of identifying the accused after nine years in the second trial, whether could have been given any weightage was the question before the Court. True it is that earlier the Investigating Officer had not arranged the test identification parade. Only after the arrest of the present appellant the test identification parade was arranged, but it is important to note that in the Challan submitted by the Court while prosecuting the other four accused persons, name of the present appellant was shown in column no.2 but there is no reference as to the age of the present appellant in

that Challan. Appellant is referred as a person aged about 26 in present one. Whether he was aged 26 years at the time of occurrence of offence or he was aged 26 years when he was tried in the present case, has not been satisfactorily come on record, on close scrutiny of the records of the present case. A man who is aged either of 16, 17 or 26 or 17, 18 or 26, it would normally be difficult to identify very person after lapse of nine years. It is not impossible to identify. One can easily identify the person after lapse of several years. Number of persons in society are not able to identify the other persons to whom they had met once or twice in past. Therefore, the evidence of the Magistrate who has prepared the Panchnama also becomes insignificant. It is not the say of the complainant that the present appellant is the author of the grievous hurt sustained by him. The allegation is general against all the four accused persons. It is also not the say of the complainant that the present appellant was amongst the two persons with whom he had made some conversation and therefore he was able to identify him during the test identification parade.

9. Of course, the fact of the case reported in ***(2005) 9 SCC 200 in case of Umesh Kamat Vs. State of Bihar*** are bit different but the observations made by the Apex Court, as to why not accepting the version of the person who claimed to identify dacoits would squarely help the present appellant. By reversing the order of conviction, the Apex Court acquitted the accused persons relying upon the earlier judgment of the Apex Court in case of *Tahir Mohd. Vs. State of M.P., reported in 1993 SCC 697*. It would be beneficial to reproduce the relevant paragraph, more particularly, paragraph 9 and 10 herein below.

> "9. We now turn our attention to the most crucial aspect of the case in regard to the identification of the appellant. The High Court relied on the evidence of PWs 1, 3 and 4. Neither PW5the informant nor PW2 (who identified three other accused) identify the appellant. Hence, their evidence need not detain us. How far the two Courts were justified in acting on their testimony on the point of identification is the question. The appellant, as already noticed, is not a person known to the prosecution witnesses. As far as PW 3 is concerned, she did not identify the appellant in the Court as he was not present. Though the trial Court and the High Court

proceeded on the basis that the four accused including the appellant were identified in the Court by PW3, in fact there was no such identification, as is clear from her deposition at Para 6. As pointed out in Malkhansingh and others Vs. State of Madhya Pradesh [(2003) 5 SCC 746] the identification parades belong to the stage of investigation and they do not constitute substantive evidence. The substantive evidence is the evidence of identification in Court because the facts which establish the identity of the accused persons are relevant under Section 9 of the Evidence Act. This Court further observed that failure to hold a test identification parade would not make inadmissible the evidence of identification in Court. Thus, in the absence of identification in the Court at the time of tendering evidence the results of test identification parade will be of little value. With reference to the evidence of PW3, the High Court committed another factual error in observing that PW3 gave a description of the general appearance of the appellant. Therefore the testimony of PW3 does not advance the prosecution case.

10. We may now turn our attention to the evidence of the other two witnesses on which the High Court relied. It is seen from the evidence of PW5 that the "dacoits had covered their face with clothes at the time of incident". PW1 also stated that the dacoits were covering their faces

except eyes and nose, with black cloth. PW 4 did not say specifically whether or not the marauders were having masks on their face. Assuming that eyes and nose could be seen to some extent despite the mask, the question is whether any of the crucial witnesses could have identified the unknown masked dacoit. PW1the neighbour who was living in the adjacent house, came forward with the version that after hearing the noise, he put on his torch and in that light, he saw the dacoits killing Rajendra Thakur at the courtyard of his house. PW1 further stated that thereafter, he went towards the doorway of the house of Rajendra Thakur and when one of the dacoits flashed the torch on him, he noticed Rajendra Thakur lying in an injured condition while one person was attacking him with knife. The witness then claimed in the cross-examination that he had flashed the torch 5 to 7 times at the dacoits from a distance of 20-30 feet. Therefore, his version is that he was able to identify the accused by flashing the torch light now and then. He claimed to have remained at the place of occurrence for 2-3 minutes. It seems to us that the evidence of PW1 is not credible. Leaving apart the probabilities and the natural course of conduct, the version of PW1 is belied by his own version in the cross-examination. While at one point of time he said that he did not get scared, at paragraph 24 of the deposition, he clearly stated as follows:

"When I went to the place of occurrence for the first time, then I saw the assault. Accused had

also run to assault me. I ran towards my house in order to save my life. I was having an Eveready torch in my hand".

In the next para, he stated that after the dacoits left the place of occurrence, he and his family members went to the spot and stayed for about 10-15 minutes. It is unbelievable that he would go and remain at the place of occurrence even for a short-while when the attack and dacoity by armed persons was going on and that he dared to flash the torch light on them more than once in order to get an idea of the miscreants. On his own showing, he was concerned about his own safety. Moreover, this witness stated that there was no electricity or lantern light at the house of the deceased. On the face of it, we need not say anything more to discredit this witness on the aspect of identification of the appellant which was done after a lapse of about seven weeks. As the dacoits covered their faces, we do not think that it was reasonably possible for the witness (PW1) to identify each of the criminals, some of whom including the appellant were unknown to him with the help of the light flashed by him intermittently, even if that version is accepted. The High Court described PW1 as an 'independent' and natural witness and believed him without testing the veracity of evidence in the light of various circumstances.“

The High Court had believed the version of

Prosecution Witness Nos.1, 3 and 4 who had claimed before the trial Court that he was able to identify the accused person, as he was holding torch with him. Here, in the present case Prosecution Witness No.11-Ratilal has identified the the accused persons in the headlight of the motorcycle. If the evidence collected and led in the test identification parade is found weak or otherwise not very reliable then the benefit would go to the accused because Prosecution Witness No.11-Ratilal has not been believed qua his capacity to identify the accused for the first time in the open Court. Time gap of nine years is comparatively long and if the prosecution intends to secure the conviction then some other evidence which could inspire confidence in the mind of the Court ought to have been collected and led by prosecution. For want of such evidence it is not possible for this Court to upheld the conviction recorded mainly on the ground to identity of the accused. The learned trial Judge has not considered the aspect and the scope of mistaken identity. The accused is described as dafer. There were total four accused persons as per say of prosecution. Three of them were tried alongwith

person who had given shelter to them. One of the accused acquitted was also described as dafer in earlier Sessions Case No.154 of 1995. The original F.I.R. was taken out from the trial of the said Sessions Case and was received in evidence. Undisputedly, the complainant is not an eye-witness and it is not the say of prosecution or anybody else, who had witnessed the incident. So, totality of the evidence led by prosecution takes this Court to a conclusion that the arguments advanced by Mr.Raval should be found acceptable.

10. Submission made by Mr.Bhate, learned A.P.P. is based on the evidence collected in the nature of test identification parade and the act of identifying the accused in the open Court by Prosecution Witness No.11-Ratilal during his deposition as discussed earlier, is a very weak piece of evidence and therefore the accused should be given the benefit of doubt. So, without entering into further discussion and other details as to the availability of muddamal and taking away of motorcycle, etc., the Court is inclined to allow this appeal, because rest of the

part of the evidence was appreciated by the learned trial Judge. The observations made by the learned trial Judge who decided the Sessions Case No.154 of 1995 ought not to have been ignored by the learned trial Judge while conducting the trial against the present appellant.

11. For the reasons aforesaid, the present appeal is allowed. The judgment and order of conviction and sentence recorded by the learned Additional Sessions Judge, Gondal in Sessions Case No.35 of 2004 on 12th January, 2005 is hereby quashed and set aside. The appellant is acquitted of all the charges levelled against him and he is ordered to be set at liberty forthwith, if not required in any other case.

(C.K.BUCH, J.)

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